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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 R'MON ANDERSON,

12 Petitioner,

13 v.

14 KATHY ALLISON, Warden,

15 Respondent.
16 _____

Case No. 11-CV-2330-LAB-(JMA)

REPORT AND
RECOMMENDATION
RECOMMENDING GRANTING
OF RESPONDENT'S MOTION
TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS AS
UNTIMELY FILED [Doc. No. 24]

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18 **I. INTRODUCTION**

19 Presently before the Court is a Motion to Dismiss Petition for Writ of
20 Habeas Corpus As Untimely Filed submitted by Respondent Kathy Allison
21 (hereafter "Respondent"). [Doc. No. 24] For the reasons set forth below,
22 the Court recommends that District Judge Larry Alan Burns grant Respon-
23 dent's Motion to Dismiss.

24 **II. FACTUAL AND PROCEDURAL SUMMARY**

25 On February 9, 2007, Petitioner was convicted of robbery and murder
26 in San Diego County Superior Court. (Cal. Penal Code §§ 87(a), 211,
27 212.5.) Petitioner received a sentence of 128 years in prison, including a
28 sentence of life in prison without parole for counts one and two, and a

1 consecutive 28 year sentence enhancement for felony murder. [Doc. No.
2 6, at 1]

3 Petitioner appealed his conviction and sentence to the California
4 Court of Appeal, alleging: (1) he was not afforded his constitutional right to
5 a representative and impartial jury; (2) the evidence was not sufficient to
6 justify the robbery special circumstance penalty; (3) the special
7 circumstance should be overturned due to prosecutorial misconduct; (4)
8 the trial court erred by allowing the jury to consider evidence of an
9 unrelated shooting; and (5) the trial court erred by admitting an outdated
10 photo of the victim's son into evidence. [Lodgment No. 2] The California
11 Court of Appeal affirmed the San Diego County Superior Court's judgment.
12 [Lodgment No. 5]

13 Petitioner then appealed his case to the California Supreme Court,
14 raising, in addition to the claims he raised in the Court of Appeal, the
15 following claims: (6) the prosecutor misstated the law of special
16 circumstances; (7) the trial court erred by allowing the jury to consider
17 evidence of unrelated bullet holes in Petitioner's truck; and (8) the trial
18 court erred by not conducting individual interviews of the jurors to
19 determine whether they had knowledge of materials not in evidence.
20 [Lodgment No. 6] The California Supreme Court denied the petition for
21 review on June 9, 2010.¹ [Lodgment No. 8]

22 Petitioner initiated this federal habeas action on October 7, 2011.
23 [Doc. No. 1] On September 13, 2012, Petitioner filed the Second Amended
24 Petition, which is the operative habeas petition, alleging two claims: (1) the
25 evidence was not sufficient to support the robbery special

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28 ¹In the Motion to Dismiss, Respondent incorrectly states the California Supreme Court denied the petition for review on July 9, 2010, and calculates the statute of limitations based on this erroneous date. See e.g. Doc. No. 24-1, p. 2, ln. 11 and p. 7, ln. 12.

1 circumstance penalty; and (2) he was not afforded his constitutional right to
2 a representative and impartial jury. [Doc. No. 19, at 2]

3 On November 7, 2012, Respondent filed a Motion to Dismiss the
4 Petition for Writ of Habeas Corpus, alleging the Petition was untimely filed.
5 [Doc. No. 24] Petitioner subsequently filed an opposition brief on January
6 3, 2013. [Doc. No. 30]

7 III. STATUTE OF LIMITATIONS

8 Petitioner's claims are governed by the Antiterrorism and Effective
9 Death Penalty Act of 1996 (hereafter "AEDPA") which provides a one-year
10 statute of limitations period for prisoners to file petitions for writs of habeas
11 corpus. 28 U.S.C. § 2244(d). In the present case, the statute of limitations
12 period for Petitioner's claims began to run when his judgment of conviction
13 "became final by conclusion of direct review or the expiration of such time
14 seeking such review." See 28 U.S.C. § 2244(d)(1)(A). Thus, the judgment
15 became final on September 7, 2010 -- 90 days after the California Supreme
16 Court denied his petition for review. [Lodgment No. 8]; See *Bowen v. Roe*,
17 188 F.3d 1157, 1159-60 (9th Cir. 1999). Accordingly, the statute of
18 limitations period began the following day, September 8, 2010, and, absent
19 tolling, ended one year later, on September 8, 2011.²

20 Petitioner, however, did not file his Petition for Writ of Habeas Corpus
21 until October 7, 2011. [Doc. No. 1] Therefore, unless he can show he is
22 entitled to tolling, pursuant to 28 USC § 2244(d)(2), his claims are time-
23 barred.

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27 ²Although Petitioner and Respondent indicate in their filings that the statute of limitations period for
28 Petitioner's claims began on October 7, 2010, the statute of limitations period for these claims actually began on
September 8, 2010 (i.e. the day following 90 days after the Supreme Court of California denied Petitioner's appeal
on June 9, 2010). [Lodgment 8; Doc. No. 24, at 7; Doc. No. 30, at 3]

IV. STATUTORY TOLLING

Under AEDPA, the one-year statute of limitations period is tolled for the “time during which a properly filed application for State post-conviction or other collateral review . . . is pending.” 28 U.S.C. § 2244(d)(2).

Additionally, “[a]n application for post-conviction review is pending while a California petitioner completes a full round of state collateral review, including during the period between (1) a lower court’s adverse determination, and (2) the prisoner’s filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law.” *Waldrip v. Hall*, 548 F.3d 729, 724 (9th Cir. 2008) (citations and internal quotations omitted, emphasis in original). Under California law, “[a]s long as the prisoner filed a petition for appellate review within a ‘reasonable time,’ he could count as ‘pending’ (and add to the 1-year time limit) the days between (1) the time the lower state court reached an adverse decision, and (2) the day he filed a petition in the higher state court.” *Evans v. Chavis*, 546 U.S. 189, 193 (2006) (citing *Carey v. Saffold*, 536 U.S. 214, 222-23 (2002)).

Petitioner, however, has not filed an application for State post-conviction review, or an application for any other collateral review. Therefore, AEDPA will not toll the statute of limitations period for his claims.

V. EQUITABLE TOLLING

In the Ninth Circuit, equitable tolling is available to prisoners who have filed petitions for writs of habeas corpus. *Espinoza-Matthews v. State of California*, 432 F.3d 1021, 1026 (9th Cir. 2005); *see also Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (holding that equitable tolling is available in cases involving petitions for writs of habeas corpus under appropriate circumstances). However, in such situations the petitioner

bears the burden of demonstrating that equitable tolling is appropriate given the facts of his or her case. *Id.* In order to be eligible for equitable tolling, the petitioner must satisfy two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented him from filing his petition within the statute of limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

In the present case, Petitioner has presented no evidence to suggest that the claims raised in his petition should be subject to equitable tolling. He does not allege that he acted diligently in pursuing his claims during the statute of limitations period, nor does he allege that any “extraordinary circumstance” prevented him from filing his Petition within said period. *Pace*, 544 U.S. at 418. Therefore, equitable tolling is not appropriate in this case.

VI. CONCLUSION AND RECOMMENDATION

Because Petitioner did not file his claims within the one-year statute of limitations period, and has not shown that statutory or equitable tolling is appropriate given the facts of his case, the undersigned magistrate judge recommends that Respondent’s Motion to Dismiss [Doc. No. 24] be **GRANTED**.

This Report and Recommendation is submitted to the Honorable Larry Alan Burns, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than **July 19, 2013** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned “Objections to Report and Recommendation.”

1 **IT IS FURTHER ORDERED** that any reply to the objections shall be
2 filed with the Court and served on all parties within **10 days** of being served
3 with the objections.

4 **IT IS SO ORDERED**

5 DATED: June 28, 2013

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8 Jan M. Adler
9 U.S. Magistrate Judge
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